Supreme Court, U.S.
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No. 99-581

IN THE
Supreme Court of the United States

NORTH STAR STEEL COMPANY,
Petitioner,

v.

MIDAMERICAN ENERGY HOLDINGS COMPANY
and MIDAMERICAN ENERGY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the court of appeals correctly apply the "state action" doctrine in holding MidAmerican's alleged anti-competitive conduct immunized from federal antitrust claims by reason of (1) Iowa's clearly articulated and affirmatively expressed state policy displacing retail competition with regulation in the provision of retail electric service and (2) Iowa's active supervision of that policy?

LIST OF PARTIES

All parties to the proceeding below are listed in the caption. The Iowa Utilities Board participated in the proceedings below as *amicus curiae*.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent MidAmerican Energy Company is a wholly owned subsidiary of MHC, Inc. MHC, Inc. is a wholly owned subsidiary of MidAmerican Funding, LLC, which is in turn wholly owned by respondent MidAmerican Energy Holdings Company, a publicly held company.

Respondent MidAmerican Energy Holdings Company has no parent company. No publicly held company owns 10 percent or more of the stock of MidAmerican Energy Holdings Company. However, on October 25, 1999, an investor group including Berkshire Hathaway, Inc. and other private investors announced that it had reached a definitive agreement to acquire MidAmerican Energy Holdings Company. The transaction is expected to be completed by April of 2000. After the transaction, Berkshire Hathaway, Inc. will own approximately 75 percent of MidAmerican Energy Holdings Company on a fully diluted basis. *See* MidAmerican Energy Holdings Company, Current Press Releases, *Berkshire Hathaway, Walter Scott and David Sokol to Acquire MidAmerican Energy Holdings* (Oct. 25, 1999), *accessed at* <http://www.midamerican.com/html/news_industry1.shtml>.

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RESPONDENTS' BRIEF IN OPPOSITION

MidAmerican Energy Holdings Company and MidAmerican Energy Company (collectively, "MidAmerican") respectfully file this brief in opposition to the petition of North Star Steel Company ("North Star") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 184 F.3d 732 (8th Cir. 1999). The opinion of the district court can be found at No. 4-97-CV-80782, 1998 U.S. Dist. LEXIS 22332 (S.D. Iowa June 23, 1998). The opinions of the court of appeals and the district court are set out in Appendix A and Appendix B, respectively, of the Petition.

JURISDICTION

The court of appeals entered its judgment on July 7, 1999. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

In addition to the statutes listed in the Petition ("Pet."), the following statutory and regulatory provisions are involved in the case:

Iowa Code § 476.8 provides in relevant part:

> Every public utility is required to furnish reasonably adequate service and facilities. . . . The charge made by any public utility for any heat, light, gas, energy efficiency and renewable energy programs, water or power produced, transmitted, delivered or furnished, . . . or for any service rendered or to be rendered in connection therewith shall be reasonable and just . . . .

Iowa Code § 476.20(1) provides in relevant part:

> 1. A utility shall not, except in cases of emergency, discontinue, reduce, or impair service to a community, or a part of a community, except for nonpayment of account or violation of rules and regulations, unless and until permission to do so is obtained from the board.

Iowa Code § 476.23(1) provides in relevant part:

> 1. An electric utility shall not construct or extend facilities or furnish or offer to furnish electric service to the existing point of delivery of any customer already receiving electric service from another electric utility without having first filed with the board the express written agreement of the electric utility presently serving this customer, except as otherwise provided in this section . . . .

Iowa Code § 476.25 provides in relevant part:

> It is declared to be in the public interest to encourage the development of co-ordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public. In order to effect that public interest, the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis. Except for good cause expressed through formal public statement, the board shall establish these exclusive service areas on or before July 1, 1979. . . .
>
> 1. The service area boundaries . . . may be modified by the board to promote the public interest, to preserve existing service areas and electric utilities' rights to serve existing customers, and to prevent unnecessary duplication of facilities, to take account of natural and physical barriers which would make electric service beyond these barriers uneconomic and impractical and those boundaries shall be modified by the board to take account of the contracts between electric utilities which have been approved by the board. . . . The board, on its own motion or at the request of an electric utility or municipal corporation, after notice and opportunity for hearing, may modify the boundaries of an electric utility exclusive service area which it has previously established if this modification, including consideration of the factors noted in this subsection, is found to be in the public interest.
>
> * * * *
>
> 3. An electric utility shall not serve or offer to serve electric customers in an exclusive service area assigned to another electric utility, nor shall an electric utility construct facilities to serve electric customers

> in an exclusive service area assigned to another electric utility. . . .

Iowa Code § 476.53 provides in relevant part:

> The board shall not allow a return on common equity on that portion of a public utility's electric generating capacity which is determined to be excess electric generating capacity. Excess electric generating capacity is that portion of the public utility's electric generating capacity which exceeds the amount reasonably necessary to provide adequate and reliable service as determined by the board.

Iowa Code § 476A.2(1) provides in relevant part:

> 1. Commencing January 1, 1977, a person shall not commence to construct a facility except as provided in section 476A.9 unless a certificate for the facility has been issued by the board . . . .

Iowa Administrative Code rr. 199-24 is set out in Respondents' Appendix attached to this brief.

STATEMENT OF THE CASE

The pertinent factual background is more fully set out in the opinion of the court of appeals. (Pet. App. A 2a-6a.)

In brief, North Star alleges that MidAmerican violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1994), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1994), by refusing to enter into agreements with North Star whereby North Star could purchase electric power for its Wilton, Iowa mill from retail suppliers other than MidAmerican.[1] MidAmerican moved to dismiss the

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[1] North Star proposed two alternate forms that the transaction could take: (1) North Star could "purchase directly power produced by a third party generator" and have MidAmerican distribute the power to North Star over MidAmerican's transmission lines; or

complaint in the district court on the ground that Iowa's pervasive regulation of retail electric service immunized it from liability for the alleged anticompetitive conduct under the "state action" doctrine enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases.

After initial argument on the motion to dismiss, MidAmerican filed a petition for declaratory ruling from the Iowa Utilities Board ("IUB") concerning MidAmerican's rights and obligations pursuant to the Iowa Code provisions regarding the supply of retail electric service. (Pet. App. A 4a.) Among other questions, MidAmerican asked:

> 1. Does the Board's assignment of an exclusive service area to MidAmerican, pursuant to Iowa Code §§ 476.22 through 476.26 and related sections, give MidAmerican the exclusive right and responsibility to sell electricity to retail customers within the assigned service area, or are MidAmerican's rights and obligations limited to the transmission and distribution of electricity that may be provided competitively by other sellers to retail customers?

(Pet. App. D 21a.) North Star filed comments in opposition to the petition, while the Office of Consumer Advocate, a division of the Iowa Department of Justice, filed a response concurring with MidAmerican's position. (Pet. App. D 19a-20a.)

Following a hearing, the IUB issued a Declaratory Ruling in which it held that retail electric service under Iowa's exclusive service territory statutes includes the supply of electricity, as well as transmission and distribution func-

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(2) MidAmerican could "purchase power from a third party expressly for transmission to North Star's mill." (Pet. App. A 3a.)

tions. *In re MidAmerican Energy Co.*, Docket No. DRU-98-1 (I.U.B. May 29, 1998) ("IUB Declaratory Ruling"). (Pet. App. D 23a.) The IUB further held that MidAmerican's obligation to provide "reasonably adequate" service at "reasonable and just" rates to retail customers within its assigned exclusive service territory, Iowa Code § 476.8, carried with it a corresponding right to provide such service—including the supply of electricity—on an exclusive basis. (Pet. App. D 23a-24a.) The IUB described exclusivity of electric service as a deliberate choice that the Iowa General Assembly had made in order to induce the capital investment necessary for utilities to provide reliable electric service to retail consumers. (Pet. App. D 23a.) Accordingly, the IUB held that MidAmerican's denial of proposals such as North Star's was proper and expected.[2] (Pet. App. D 24a.)

North Star appealed the IUB Declaratory Ruling to the Iowa state district court, which affirmed the ruling. *North Star Steel Co. v. Iowa Utils. Bd.*, No. AA3127 (Iowa Dist. Ct. Jan. 29, 1999). North Star has in turn appealed that ruling to the Iowa Supreme Court. *North Star Steel Co. v. Iowa Utils. Bd.*, No. 99-0342 (Iowa appeal docketed Mar. 5, 1999).

On June 23, 1998, the district court below (Wolle, J.) granted summary judgment to MidAmerican. On appeal, the Eighth Circuit Court of Appeals affirmed. The court of appeals held that, under Iowa law, preclusive effect must be given to the prior Iowa state court determination that the assignment of exclusive service territories by the IUB includes generation, and that utilities such as MidAmerican therefore have the exclusive right to sell elec-

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[2] The IUB found that the alternate forms of transaction proposed by North Star made no difference to these conclusions. (Pet. App. D 25a.)

tricity in their assigned service areas. (Pet. App. A 8a-10a.)

The court of appeals went on to hold that "the exclusive service territory statute is explicit state authorization for displacing competition in both the distribution and generation of retail electric service" and that "the Board has continued to implement the state policy of displacing competition by assigning new customers to exclusive service providers and determining the assigned exclusive service provider in cases of doubt or conflict." (Pet. App. A 11a, 12a.) Accordingly, the court of appeals held that the district court had not erred in finding both prongs of the state action doctrine to be satisfied and in granting summary judgment to MidAmerican. (Pet. App. A at 13a.)

REASONS FOR DENYING THE WRIT

I. THE STATE OF IOWA'S REGULATION OF RETAIL ELECTRIC SERVICE SATISFIES BOTH PRONGS OF THE TEST FOR APPLICATION OF THE "STATE ACTION" DOCTRINE

The "state action doctrine" immunizes a private party from liability under the federal antitrust laws if (1) the private party acts pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition, and (2) the state has "actively supervised" discretionary conduct by private parties undertaken pursuant to the clearly articulated state policy. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Patrick v. Burget*, 486 U.S. 94, 100 (1988).

The State of Iowa's control of the provision of retail electric service satisfies both prongs of the state action test. In 1977, the Iowa General Assembly declared the establishment of exclusive electric service areas to be in

the public interest and directed the Iowa State Commerce Commission (predecessor to the current IUB) to establish a system of exclusive retail electric service territories. Iowa Code § 476.25. The same statute provides that an electric utility cannot "serve or offer to serve electric customers in an exclusive service area assigned to another electric utility" or construct facilities to provide such service. Iowa Code § 476.25(3). Likewise, the construction of facilities or furnishing of electric service to "the existing point of delivery of any customer already receiving electric service from another electric utility," without the express written consent of that utility, is forbidden. Iowa Code § 476.23(1). These provisions constitute a clear determination by the State of Iowa to displace competition in the provision of retail electric service with a system of exclusive service territories.[3]

The structure of exclusive retail service territories, including exclusivity in the supply of electricity, is central to Iowa's regulation of retail electric service. For example, Iowa Code § 476.8 requires each utility to furnish "reasonably adequate service and facilities" at "reasonable and just" rates. "Adequate service and facilities" include sufficient generating capacity to supply the utility's service area.[4] However, capacity that "exceeds the amount reasonably necessary to provide adequate and reliable service" is "excess electric generating capacity"; the utility is

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[3] As MidAmerican demonstrated before the district court and court of appeals, this statutory system was adopted to replace a prior system that permitted utilities to compete for customers. Pet. App. A 3a.)

[4] *Id.*; *see also* IUB Declaratory Ruling. (Pet. App. D 23a.) In addition, Iowa Code § 476.20(1) provides that no utility may abandon, reduce, discontinue or impair service to any community or part of a community without prior Board approval.

not allowed a return on common equity on such capacity.[5] The sufficiency of capacity (or the existence of excess capacity) can only be determined in light of the utility's retail service obligation.[6]

Similarly, persons seeking to construct new generation facilities with a capacity of 25 megawatts or more must obtain a certificate of public convenience, use and necessity from the IUB. Iowa Code § 476A.2(1). The current and projected future demand for power in the exclusive service areas of the participants proposing to construct or purchase power from a proposed generating facility are key factors in the IUB's consideration of an application for a certificate. *See* Iowa Admin. Code rr. 199-24.4(3)-(4). (Respondents' App.)

Courts have found an intent to displace competition in even less comprehensive enactments. In *Municipal Utils. Board v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991), *cert. denied*, 513 U.S. 1148 (1995), Alabama legislation establishing exclusive service territories permitted some competition for large industrial customers. *Fuchs v. Rural Elec. Convenience Co-op., Inc.*, 672 F. Supp. 1111 (C.D. Ill. 1987), *aff'd*, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), involved a statute similar to Iowa's, except that the utilities themselves were authorized to determine the exclusive service areas in the first instance by agreement (failing which, the Illinois Commerce Commission would make the deter-

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[5] Iowa Code § 476.53. *See also Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 419 N.W.2d 373, 375-76 (Iowa 1988); *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 412 N.W.2d 600, 604-05 (Iowa 1987); *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 347 N.W.2d 423, 427-30 (Iowa 1984).

[6] *See Consumer Advocate*, 419 N.W.2d at 375-76; *Iowa-Illinois*, 412 N.W.2d at 604-05; *Iowa-Illinois*, 347 N.W.2d at 427-30.

mination). In *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996), exclusive service territories were voluntarily negotiated by the utilities concerned, not assigned by the State of Florida. In each of these cases, the courts found clear articulation of a state policy to displace competition by means of exclusive service territories and found the alleged anticompetitive conduct immunized by the application of the state action doctrine. *Alabama Power Co.*, 934 F.2d at 1502; *Fuchs v. Rural Elec. Convenience Co-op, Inc.*, 858 F.2d 1210, 1216 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Praxair*, 64 F.3d at 612.

Active supervision, the second prong of the state action test, is required in order to show that the state, not private parties, has ultimate control in implementing a policy displacing competition. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). In Iowa, the controlling statutes explicitly authorize the state regulatory agency to assign territories for exclusive retail electric service. The Iowa State Commerce Commission, not the utilities, established the exclusive service territories in the first instance. (Pet. App. A 3a.) The IUB has continued to implement the General Assembly's policy of exclusive service areas by assigning new customers to exclusive service providers, modifying assigned territories, and determining the assigned exclusive service provider when doubt or conflict arises. (Pet. App. A 12a.) It must review and approve each change to those territories, whether contested or uncontested by the utilities affected. Iowa Code § 476.25 (1).[7]

[7] MidAmerican supplied the District Court with scores of administrative decisions in which the IUB has applied the exclusive service territory statutes. (JA 136-38, 140-43.)

In the IUB's Declaratory Ruling (Pet. App. D), the agency carefully analyzed the scope of Iowa's exclusive service territory statutes, and held that they "apply to the provision of electricity, and the provision of electricity includes generation, distribution, and transmission. MidAmerican has a statutory right, and an obligation, to provide electric service to retail customers located within its exclusive service territory." (Pet. App. D 23a). The IUB found that a utility's corresponding rights under the exclusive service territory statutes were not limited to transmission and distribution. Rather, the exclusive service territory statutes represented a legislative balancing of rights and obligations on the "fulcrum" of "the long-term, heavy capital investment traditionally associated with electric utility operations." *Id.* North Star's election of an alternate supplier would undercut the utility's commitment of capital and upset that balance:

> The Iowa legislature made the policy decision to displace competition with the regulatory scheme found in Chapter 476. If Iowa is to change to a competitive retail electric environment to respond to changes occurring in the electric industry, statutory changes are required. Presumably, any changes would create a new balance of rights and obligations for those who provide generation, transmission, or distribution service.

(Pet. App. A 23a-24a.)

In the decision below, the Eighth Circuit Court of Appeals gave preclusive effect to the state district court ruling affirming the IUB's Declaratory Ruling that the exclusive retail electric service territories under the Iowa statutes comprised the supply of electricity as well as distribution and transmission. (Pet. App. A 8a-10a.) North Star's third question (Pet. i) misstates the court of appeals' action, because the court of appeals held that the

state court decision, not the IUB ruling, had preclusive effect. Nowhere in the body of its Petition does North Star suggest that the court of appeals erred in that determination, nor does it offer any reason for this Court to review the determination. Rather, North Star appears to attack the IUB for not having limited the term "retail electric service" to "the distribution of electricity." But North Star's assertion that "the term 'at retail' refers to the distribution function" (Pet. 12) is based solely on an argumentative affidavit submitted by one of its consultants. To the contrary, as the IUB, the district court, and the court of appeals all recognized, "retail electric service" within the meaning of the Iowa statutes comprises the entirety of the service that a public utility provides for its retail customers.

Far from relying on a particular characterization of "industry segments" in the electric industry, as North Star's third question suggests (Pet. i), the IUB, the district court, and the court of appeals simply recognized that Iowa Code § 476.25 "expressly provides that its purpose is to create exclusive service areas which have only one supplier of electricity." (Pet. App. A 10a-11a.) MidAmerican is that retail supplier within its own service territory, and its exclusivity extends to the retail supply of electricity, whether by purchase or from its own generation.

II. There Is No Reason for This Court to Review the Decision of the Court of Appeals

A. The Possibility of Future Retail Deregulation Does Not Negate the Force and Effect of Current Regulation

In arguing that this case is worthy of review, North Star asserts that "[d]ecreased regulation of the electric industry will increase reliance upon the antitrust laws to

preserve competition and it is important, therefore that there be a clear and uniform standard governing the applicability of the 'state action' immunity doctrine." (Pet. 6.) However, North Star mixes its doctrines and confuses deregulation at the wholesale level with deregulation at the retail level. Where regulation does not displace competition in the provision of electricity, or where it no longer does so because of deregulation, the state action doctrine is irrelevant. However, as long as Iowa pervasively regulates retail electric service, including the assignment of exclusive electric service areas, the doctrine will apply precisely because deregulation has not occurred.

North Star insinuates that regulation of *retail* electric service has been displaced by virtue of the deregulation that has occurred at the *wholesale* level of the electric industry. (*See* Pet. 6-7.) That is not the case. Competition to sell power to utilities, including competition among utilities to sell power on the wholesale level, is not the same as competition in the provision of retail electric service.[8]

Wholesale sales are subject to exclusive federal jurisdiction under the Federal Power Act. 16 U.S.C. §§ 824(b), (d), (e) (1994); *see Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986). North Star is a retail electricity customer, and its electric service is subject to regulation by the State of Iowa. Significantly, the Energy Policy Act of 1992, which North Star cites,[9] contains an express prohibition on any Federal Energy Regu-

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[8] For example, *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Case. (CCH) ¶ 63,526, at 76,792 (N.D.N.Y. Sept. 8, 1980) (Pet. 6-7), dealt with a dispute between a municipality and the utility from which it sought to obtain power for resale, *not* the sale of electricity directly from a third-party provider to a retail customer.

[9] (Pet. at 7.)

latory Commission ("FERC") order "which is inconsistent with any State law which governs the retail marketing areas of electric utilities" and on any FERC order requiring retail wheeling of the type North Star seeks here. 16 U.S.C. §§ 824k(g),(h) (1994). Even less to the point are North Star's citations to the Public Utility Regulatory Practices Act, 16 U.S.C. § 824a-3 (1994) ("PURPA"), and Iowa Code § 476.41, each of which deals with cogeneration and similar small power production facilities, and neither of which encourages retail wheeling of the type sought by North Star. Indeed, PURPA expressly bars FERC from authorizing qualifying facilities to make retail sales.[10]

Retail deregulation (also referred to as retail choice) in the electric industry presents issues of policy for state legislatures, including the need to assure that small businesses and families will continue to have access to reliable electric service at reasonable cost; the need to assure that utilities that have made prudent investments in the past to meet consumer needs will be able to recover the costs of those investments; and the effect of deregulation on the environment. In considering these and other issues, states have moved toward deregulation at different speeds and through different programs. The President has proposed legislation to build on this progress, but not to disrupt it or to interfere with the states' processes.[11]

North Star's demands are an effort to end-run the right of the Iowa General Assembly to consider retail choice

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[10] 16 U.S.C. § 824a-3(a) ("Such [FERC] rules may not authorize a qualifying . . . facility to make any sale for purposes other than resale.").

[11] *See* The White House, Office of the Press Secretary, *The Clinton Administration's Comprehensive Electricity Competition Plan* (Mar. 25, 1998), *accessed* at <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1998/3/26/4.text.1>.

legislation on its own terms. North Star's assertions about the importance of the antitrust laws in a deregulated industry puts the cart before the horse. Should Iowa enact retail choice, the antitrust laws will certainly become an important tool for protecting competition. Until that time, however, pervasive state regulation in the provision of retail electric service remains the operative system.

B. This Case Reflects No "Split" Among the Circuits Meriting Review By This Court

North Star also asserts that there is a "split among the federal circuit courts" with respect to the first prong of the state action doctrine, which requires that a state policy displacing competition with regulation be "clearly articulated" and "affirmatively expressed." North Star characterizes this split as one between those courts that have adopted a "foreseeability" standard in which "inference" of a policy is accepted, and those which still require "clear articulation" of a policy pursuant to the *Midcal* standard. (Pet. 8-12.) These claims both mischaracterize the decision below and overstate the extent of any supposed split among circuits. The "split in the circuits" hypothesized by North Star is not presented by this case, and is in any event overstated by North Star.

As an initial matter, the court of appeals did not rely on an inference from ambiguous or unclear statutory language, as North Star asserts. (Pet. 12.) Rather, the court of appeals based its decision on the express language of the Iowa statute, which directly displaces competition with regulation by the establishment of exclusive retail electric service territories, and the preclusive affect of the state court decision affirming the IUB's Declaratory Ruling. As the court of appeals found:

> The state statute expressly provides that its purpose is to create exclusive service areas which have only

> one supplier of electricity. *See* IOWA CODE § 476.25 (1997). [Footnote omitted.] The policy to displace competition in the provision of retail electric service, including the generation of electricity, is unambiguous because the statute has been interpreted to include the generation of electricity. *See In re Mid-American Energy Co.*, Docket No. DRU-98-1, slip op. at 5. Thus, the exclusive service territory statute is explicit state authorization for displacing competition in both distribution and generation of retail electric service.

(Pet. App. A at 10a-11a.) Thus, the court of appeals applied the "clear articulation" test enunciated by this Court, and did not rely not on an impermissible "inference," as North Star contends (Pet. 13). North Star's quarrel is, as it properly should be, with the IUB and the Iowa General Assembly, not with the federal court of appeals.

North Star also asserts that the split is presented by the contrast between *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1688 (1998) and cases such as *Praxair*, 64 F.3d 609. The Petitioner in *Columbia Steel Casting Co.* raised a similar contention last Term, also contrasting *Praxair* and *Columbia Steel Casting Co.* This Court requested briefing by the Solicitor General, who in turn recommended denial of the petition for certiorari, stating that his office "perceive[d] no conflict that calls for resolution by this Court." [12] Specifically, the Solicitor General observed:

> [U]nlike petitioner (Pet. 25), we see no firm basis for concluding that the *Praxair* court would have recognized immunity on the facts of this case, or that

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[12] Brief for the United States as Amicus Curiae at 14, *Columbia Steel Casting Co. v. Portland General Elec. Co.*, No. 97-49, *cert. denied*, 118 S. Ct. 1688 (1998).

> the court below would have rejected a claim of immunity on the facts of *Praxair*.

Id. at 16 (footnote omitted).

The Solicitor General's reference to "the facts of [the] case" is a reminder that cases involving the state action doctrine are heavily dependent on the facts and circumstances of each case. (*See* Pet. 10.) The issues to be decided include whether the state has clearly articulated and affirmatively expressed a policy to displace competition with regulation, whether that policy has been actively supervised by the state, and whether it extends to immunize the particular conduct in question. Because such cases are "fact-bound," Brief for the United States as Amicus Curiae in No. 97-49 at 8, in the absence of significant doctrinal issues, they are not ordinarily appropriate for review by this Court on certiorari. *See also id.* at 11 n.5. North Star has offered no rationale that justifies a grant of certiorari in this case.

North Star's final argument is that the IUB's approval of an experimental program of customer choice somehow demonstrates that Iowa's policy is not "clearly articulated," "affirmatively expressed," or "actively supervised." (Pet. 13-14.) However, the fact that the Board, which has authority to establish exclusive service territories, may also have authority to approve a limited experimental program for the purpose of testing how retail competition might work hardly suggests the absence of a clearly articulated state policy. As this Court has made clear, the state action doctrine should not be construed in a way that unnecessarily reduces the "range of regulatory alternatives available to the State."[13] Likewise the fact that the pro-

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[13] *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985) (rejecting argument that state policy must "require, rather than merely permit, anticompetitive conduct" in order for the state action doctrine to apply).

gram—limited in duration and extent—was subject to the IUB's detailed review and approval [14] confirms that the State's policy is, in fact, closely supervised.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[14] *See* Pet. App. E.

APPENDIX

APPENDIX

IOWA ADMINISTRATIVE CODE rr. 199-24.4(3), (4)

199—24.4(476A) Application for a certificate—contents. Each person or group of persons proposing to construct a facility after January 1, 1977, or a significant alteration to a facility shall file an application for certificate of public convenience, use, and necessity with the board, unless otherwise provided by these rules.

* * * *

24.4(3) In section 3, entitled "Current system information," the applicant shall include the following:

a. A specific and complete description of all participants' operating generating units in all participants' operating electric power generating stations. Such description shall include, but shall not be limited to, installed generating capacity including nameplate, net to the busbar ratings and net to the distribution system of each unit in megawatts, primary fuel types and sources for each unit, the heat rate of each unit in BTU/kWh over the range of operating capacity, date placed in service and projected retirement date. Applicant shall also describe all other sources of electricity available to serve participants' service area. Description of other sources of electricity shall include, but shall not be limited to, total kilowatts and kilowatt hours available in each quarter of the year. For this purpose, a group of several similar generating units operated together at the same location such that segregated records of energy output are not available shall be considered as a single unit.

b. For each quarter of the ten (10) years preceding the date of application, system load level information in the form of duration curves, load curves and integrated energy curves. Supporting data for each curve shall be supplied in tabular form.

c. For each quarter of the ten (10) years preceding the date of application, in each participant's service area, the number of customers in each customer class, the average customer consumption in each customer class and the average price per kilowatt hour for each customer class. Data for the largest industrial users shall be further classified according to two digit Standard Industrial Classification (SIC) Codes. Applicant must indicate whether any information provided under this subsection constitutes a clearly unwarranted invasion of personal privacy or trade secrets required to be kept confidential by the board under the Iowa Administrative Procedure Act. Applicant shall provide capital costs and operating and maintenance expenses per kilowatt hour by generating station for each quarter of the ten (10) years preceding the date of application.

d. For purposes of this subsection, the period chosen for presentation of quarterly data shall be any appropriate three (3)-month interval, selected on the basis of the shape of the load curve or any other load characteristics of the installed generating capacity.

24.4(4) *In section 4, entitled "Future system projections," the applicant shall include the following:

a. (1) A description of each participant's projected installed generating capacity for each year from the date of application through the proposed facility's life. Such description shall include but not be limited to the primary type of fuel projected to be used by each generating unit in the system and the proportion each generating unit is projected to contribute to total installed generating capacity.

*** Objection, see filed rules published IAC Supp. 1/9/77, 5/4/77, 7/13/77.**

(2) A description of other sources of electricity available or likely to be available to supply participants' service areas. Such description shall include, but shall not be limited to, total kilowatts and kilowatt hours available for each year from the date of application through the proposed facility's life.

b. (1) Identification and description of participants' existing and planned programs designed to conserve energy. Such description shall include, but shall not be limited to, estimated kilowatt hours saved for each year from the date of application through the proposed facility's life.

(2) An analysis of the effect construction of the facility would have on the demand for electricity. This analysis shall include, but shall not be limited to, all anticipated changes in demand due to community developments induced by construction of the facility.

(3) An identification of the forecast methodology used by applicant including a discussion of the analytical techniques used, the manner in which the techniques are related to the forecast, and the confidence levels and expected range of accuracy for the components of the forecast.

(4) A projection of system load levels in the form of duration curves, load curves and integrated energy curves, for each year from the date of application through the proposed facility's life. Supporting data for each curve shall be supplied in tabular form.

c. For each participants' service area, a projection of the number of customers in each customer class, average customer consumption by customer class and average price per kilowatt hour for each year from the date of application through the proposed facility's life. Applicant shall provide projections of capital costs and operating

and maintenance costs per kilowatt hour for each station in the participants' system and for the proposed facility for each year from the date of application through the proposed facility's life. Average price per kilowatt hour may be stated as an aggregate index of all rate classifications.